RECORD AND BRIEFS

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Nos. 16-74, 16-86, 16-258

In the Supreme Court of the United States

ADVOCATE HEALTH CARE NETWORK, ET AL., *Petitioners*,
v.
MARIA STAPLETON, ET AL.

SAINT PETER'S HEALTHCARE SYSTEM, ET AL., *Petitioners*,
v.
LAURENCE KAPLAN

DIGNITY HEALTH, ET AL., *Petitioners*,
v.
STARLA ROLLINS

On Writs of Certiorari to the United States Courts of Appeals for the Third, Seventh and Ninth Circuits

BRIEF OF THE GENERAL CONFERENCE OF SEVENTH-DAY ADVENTISTS AS *AMICUS CURIAE* SUPPORTING PETITIONERS

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QUESTION PRESENTED

The Employee Retirement Income Security Act of 1974 ("ERISA") governs employers that offer pensions and other benefits to their employees. "Church plans" are exempt from ERISA's coverage. 29 U.S.C. §§ 1002(33), 1003(b)(2). For over thirty years, the three federal agencies that administer and enforce ERISA—the Internal Revenue Service, the Department of Labor, and the Pension Benefit Guaranty Corporation—have interpreted the church plan exemption to include pension plans maintained by otherwise qualifying organizations that are associated with or controlled by a church, whether or not a church itself established the plan.

The question presented is whether the church plan exemption applies so long as a pension plan is maintained by an otherwise qualifying church-affiliated organization, or whether the exemption applies only if, in addition, a church initially established the plan.

TABLE OF CONTENTS

Question Presented i

Table of Authorities iii

Introduction and Interests of *Amicus* 1

Statement 4

Summary of Argument 10

Argument 14

I. The courts of appeals' narrow reading of the "church plan" exemption would create a serious and unnecessary risk of unconstitutional interdenominational discrimination. 14

A. For reasons of religious doctrine and polity, some religious denominations—such as the Seventh-day Adventists—exhibit a high degree of integration between the church and its health care systems. 15

B. Any attempt to distinguish among the various religious organizations and their related health care systems would raise serious constitutional concerns. 23

II. The courts of appeals' narrow reading would create a serious and unnecessary risk of unconstitutional interference in religious organizations' autonomy 28

Conclusion 41

TABLE OF AUTHORITIES

Cases

Board of Education of Kiryas Joel Village School District v. *Grumet*, 512 U.S. 687 (1994) 4, 12, 24, 26

Burwell v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751 (2014) 30, 35

Cannata v. *Catholic Diocese of Austin*, 700 F.3d 169 (5th Cir. 2012) 33

Church of Scientology Flag Service Organization, Inc. v. *City of Clearwater*, 2 F.3d 1514 (11th Cir. 1993) 36

Church of the Lukumi Babalu Aye, Inc. v. *City of Hialeah*, 508 U.S. 520 (1993) 29

Cohen v. *City of Des Plaines*, 8 F.3d 484 (7th Cir. 1993) 32, 37

Colorado Christian University v. *Weaver*, 534 F.3d 1245 (10th Cir. 2008) 37

Commack Self-Service Kosher Meats, Inc. v. *Weiss*, 294 F.3d 415 (2d Cir. 2002) 37

Corporation of Presiding Bishop of Church of Jesus Christ of Latter-day Saints v. *Amos*, 483 U.S. 327 (1987) 29, 31, 37, 38

Coulee Catholic School v. *Labor & Industry Review Commission*,
768 N.W.2d 868 (Wis. 2009) 33

Edward J. DeBartolo Corp. v. *Florida Gulf Coast Building & Construction Trades Council*,
485 U.S. 568 (1988).....10, 27

EEOC v. *Hosanna-Tabor Evangelical Lutheran Church & School*,
597 F.3d 769 (6th Cir. 2010).....29

Espinosa v. *Rusk*,
634 F.2d 477 (10th Cir. 1980).....32, 37

Hosanna-Tabor Evangelical Lutheran Church & School v. *EEOC*,
132 S. Ct. 694 (2012).....3, 12, 13, 28, 29, 32, 33, 35

Kaplan v. *Saint Peter's Healthcare System*,
810 F.3d 175 (3d Cir. 2015) 8, 9, 26, 37, 38

Kedroff v. *Saint Nicholas Cathedral of Russian Orthodox Church in North America*,
344 U.S. 94 (1952).....28, 35, 36

Kreshik v. *Saint Nicholas Cathedral*,
363 U.S. 190 (1960).....36

Larson v. *Valente*,
456 U.S. 228 (1982).....3, 11, 12, 24, 25, 26

Lemon v. *Kurtzman*,
403 U.S. 602 (1971).....25

Mitchell v. *Helms*,
530 U.S. 793 (2000).....31, 37

Montrose Christian School Corp. v. *Walsh*,
770 A.2d 111 (Md. 2001).....33

New York v. *Cathedral Academy*,
434 U.S. 125 (1977).....31, 37

NLRB v. *Catholic Bishop of Chicago*,
440 U.S. 490 (1979).....2, 31, 39

Northwest Austin Municipal Utility District Number One v. *Holder*,
557 U.S. 193 (2009).....10

Presbyterian Church in the United States v. *Mary Elizabeth Blue Hull Memorial Presbyterian Church*,
393 U.S. 440 (1969).....36, 37

Rollins v. *Dignity Health*, 830 F.3d 900 (9th Cir. 2016).....8, 9, 26, 37

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426 U.S. 696 (1976).....2, 12, 28, 30, 36

Sheedy v. *Adventist Health System Sunbelt Healthcare Corp.*,
No. 6:16-cv-1893 (M.D. Fla., filed Oct. 28, 2016).....14

Sherbert v. *Verner*,
374 U.S. 398 (1963).....38

Sklar v. *C.I.R.*,
282 F.3d 610 (9th Cir. 2002) 24

Spencer v. *World Vision, Inc.*,
633 F.3d 723 (9th Cir. 2011) 29, 32

Stapleton v. *Advocate Health Care Network*,
817 F.3d 517 (7th Cir. 2016) 8, 9, 26, 37

Tenafly Eruv Association, Inc. v. *Borough of Tenafly*,
309 F.3d 144 (3d Cir. 2002) 29

United States v. *X-Citement Video, Inc.*,
513 U.S. 64 (1994) 10

Universidad Central de Bayamon v. *NLRB*,
793 F.2d 383 (1st Cir. 1985) 13, 39, 40

University of Great Falls v. *NLRB*,
278 F.3d 1335 (D.C. Cir. 2002) 32, 37, 40

Statutes

26 U.S.C. § 414(e) 5

29 U.S.C. § 1002(33) 4, 7

29 U.S.C. § 1003(b)(2) 4

Legislative Materials

125 Cong. Rec. 10057 (1979) 37

S. Rep. No. 93-383 (1973) 5

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The Review & Herald (June 21, 1906).....18

White, Ellen G., 1 *Testimonies for the Church*, (1868).....17

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INTRODUCTION AND INTERESTS OF *AMICUS*[1]

As Petitioners persuasively explain, the decisions under review in this case create for Petitioners the very risks of unconstitutional government interference that Congress intended to eliminate in passing the 1980 amendments to ERISA. See Pet. Br. 55–59. As a result of those decisions, and numerous lawsuits filed in their wake, those risks are now faced not just by Petitioners, but by virtually *every* church-related retirement plan, and virtually every church or church-related entity affiliated with such a plan.

Amicus General Conference of Seventh-day Adventists (the Church) and its affiliated healthcare systems are a prime example. The General Conference is the highest administrative level of the Seventh-day Adventist Church and represents more than 154,000 congregations with more than 19.8 million members worldwide, including 6,300 congregations and more than 1.2 million members in the United States. In the United States, the Church also operates the Adventist hospital system, one of the largest in the country, with 84 hospitals employing 126,000 people, plus more than 300 clinics and other facilities. Each year the system handles more than 600,000 inpatient admissions, and millions of outpatient visits.

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[1] No one (including a party or its counsel) other than the *amicus curiae*, its members and counsel authored this brief in whole or in part, or made a monetary contribution intended to fund its preparation or submission. All parties have consented to the filing of this brief in communications on file with the Clerk.

Late last year, one of the Church's largest healthcare operations, Adventist Health System, and the Administrative Committee of the retirement plan covering virtually all Church and Adventist health employees, were sued in a class action on grounds similar to those in the cases now before the Court. While the Church is confident in its legal position—in part because the retirement plan was established and is still operated by the Church itself—this lawsuit and, more generally, the legal theories adopted by the three decisions now before the Court are of great concern to the Church.

First, the mere process of litigating such claims is not only expensive, but intrusive. For example, it will likely require examination of such sensitive *religious* questions as which Adventist entities are properly considered part of the "church," and which fall outside the "church." Such inquiries necessarily trench upon the First Amendment right, long recognized by this Court, of "religious bodies to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Serbian Eastern Orthodox Diocese for the United States of Am. & Can.* v. *Milivojevich*, 426 U.S. 696, 721–22 (1976). Here, as in *NLRB* v. *Catholic Bishop of Chicago*, "[i]t is not only the conclusions that may be reached by the [government] which may impinge on rights guaranteed by the Religion Clauses, but also the very process of inquiry[.]" 440 U.S. 490, 502 (1979). If adopted by this Court, the legal theories underlying the three de-

cisions now under review will require government authorities to adjudicate just such questions, and thereby "dangerously undermine ... religious autonomy." *Hosanna-Tabor Evangelical Lutheran Church & Sch.* v. *EEOC*, 132 S. Ct. 694, 715 (2012) (Alito, J., concurring). And that would be bad for all churches, religious denominations, and religiously affiliated organizations.

Second, in the aggregate, litigation of these claims against numerous religious healthcare systems creates a substantial risk of interdenominational discrimination based, at bottom, on religious doctrine, polity, or both. While the Church is likely to end up on the favorable end of that discrimination on the particular issue here, the Church has a far greater, long-term interest in protecting *all* religious bodies against such discrimination. The Church thus has a powerful interest in reinforcing this Court's long-standing teaching that, consistent with the First Amendment, "one religious denomination cannot be officially preferred over another," that is, a government may not "'pass laws which aid one religion' or that 'prefer one religion over another.'" *Larson* v. *Valente*, 456 U.S. 228, 246 (1982). That bedrock principle should apply not only when specific religious denominations or practices are singled out for burdens or advantages, but also when laws interact with a denomination's history or beliefs to produce discriminatory effects. See *id.* at 230, 246, 253. Indeed, as *Valente* shows, the denominational nondiscrimination principle demands uniform treatment even when the government tries to

accommodate religious practices, not only when it burdens them. See *id.* As Justice O'Connor put it in *Board of Education of Kiryas Joel Village School District* v. *Grumet*, a "law prohibiting the consumption of alcohol may exempt sacramental wines, but it may not exempt sacramental wine use by Catholics but not by Jews." 512 U.S. 687, 715–16 (1994) (O'Connor, J., concurring in part and concurring in the judgment).

Here again, any departure from that principle would be devastating, not just for Petitioners, but for all churches and denominations.

STATEMENT

An understanding of how those principles apply in this case requires a rudimentary understanding of ERISA's "church plan" exemption, its history, and its interpretation by the federal agencies that administer ERISA as well as the decisions under review.

1. When Congress enacted ERISA in 1974, it included exemptions from the statute's otherwise broad coverage of private retirement plans. One of those exemptions was for "church plans." See 29 U.S.C. § 1003(b)(2). ERISA originally defined "church plan," as relevant here, as "a plan established and maintained for its employees by a church or by a convention or association of churches which is exempt from tax under section 501 of the Internal Revenue Code of 1954[.]" 29 U.S.C. § 1002(33)(A) (1974).

Congress intended that exemption to vindicate the constitutionally protected independence of churches,

which it feared ERISA might otherwise compromise. As the Senate committee report put it:

> The committee is concerned that the examinations of books and records that may be required in any particular case as part of the careful and responsible administration of the insurance system might be regarded as an unjustified invasion of the confidential relationship that is believed to be appropriate with regard to churches and their religious activities.

S. Rep. No. 93-383 at 81 (1973).

2. Congress's intent to protect churches from administrative scrutiny was threatened three years after ERISA was enacted. In 1977, the IRS considered application of the "church plan" exemption to "religious orders" of Roman Catholic nuns "whose principal activity is the operation of hospitals[.]" Gen. Counsel Memorandum, GCM 37266, 1977 WL 46200, at *1 (I.R.S. Sept. 22, 1977) (interpreting ERISA's parallel provisions in the Internal Revenue Code at 26 U.S.C. § 414(e)). The IRS determined that the exemption required the agency to determine whether the religious orders were themselves "churches." *Id.* at *3.

That question, the IRS felt, "is necessarily one of fact and must be decided on a case by case basis." *Id.* And to answer it, the agency would inquire into church structure and doctrine: while some religious orders, "especially those of the Catholic Church, will often have many of the characteristics of a 'church[,]'

... because of their intimate organizational relationship with the Catholic Church," *id.*, *qualifying* as a church would require the religious order to show that it "is an integral part of a church and carries out ... the *religious* functions of the church." *Id.* at *4.

The IRS proceeded to answer its question in the negative. Nuns, the IRS held, "are not priests and therefore cannot perform all the sacerdotal functions of the Catholic Church that are peculiar to priests." *Id.* at *5. While they "administer certain sacraments" to patients in the hospitals they operate, the agency considered those functions "*incidental* to [their order's] principal function of operating a health facility." *Id.* (emphasis added). Operating hospitals "is not a religious function as that term is commonly understood," *id.*; thus "because their principal activity is not religious, the orders are not churches." *Id.*; see also *id.* at *6 ("[W]hile these activities are functions of the Catholic Church, they are not 'church functions' as that phrase is used in the Code and Regulations since they are not religious.").

3. Congress recognized that the IRS's ruling contravened Congress's purpose of avoiding government intrusion in church affairs. Congress therefore amended ERISA's church plan exemption in 1980 to overrule the IRS's decision and prevent the agency's error from being repeated.

Congress did so through two amendments to ERISA, which work in tandem. First, Congress pro-

vided that employees of church-affiliated organizations would be considered employees of the church. See 29 U.S.C. § 1002(33)(C)(ii); see also *id.* § 1002(33)(C)(iv) (providing that an organization is associated with a church if it "shares common religious bonds and convictions with that church"). Second, Congress provided that a church plan "includes a plan maintained by an organization ... the principal purpose or function of which is the administration or funding of a plan or program for the provision of retirement benefits ... for the employees of a church[.]" *Id.* § 1002(33)(C)(i). The net result is that a plan "maintained" for the benefit of employees of church-affiliated groups is a church plan, whether or not the affiliated group is itself a "church."

As the IRS recognized in 1983, that definition obviates administrative inquiries into whether a given organization is a "church." Upon a simple finding that a group maintaining a retirement plan is "affiliated" with a church, there is no need to evaluate the religious qualifications of group members or the religious significance of the functions they perform. Gen. Counsel Memorandum, GCM 39007, 1983 WL 197946, at *4 (I.R.S. July 1, 1983).

4. For more than three decades, courts, federal agencies, and religious institutions have operated under that view. That understanding has spared the government and religiously affiliated organizations from wrangling over questions of doctrine and polity—to the mutual benefit of church, state, and the members

of the public employed or served by religious organizations.

That happy consensus has been upset by the three circuit court opinions under review in this case. *Kaplan* v. *Saint Peter's Healthcare Sys.*, 810 F.3d 175 (3d Cir. 2015); *Stapleton* v. *Advocate Health Care Network*, 817 F.3d 517 (7th Cir. 2016); *Rollins* v. *Dignity Health*, 830 F.3d 900 (9th Cir. 2016). According to those decisions, ERISA has always defined "church plan" as a plan both "established" and "maintained" by qualifying organizations. *Kaplan*, 810 F.3d at 180; *Stapleton*, 817 F.3d at 523; *Rollins*, 830 F.3d at 905. While only "churches" could either establish or maintain a "church plan" under the original text, "[t]he 1980 amendments provided an alternate way of meeting the *maintenance* requirement by allowing plans maintained by church agencies to fall within the exemption." *Kaplan*, 810 F.3d at 180 (emphasis added). But the lower court decisions also held that the 1980 amendments did not touch the requirement that a retirement plan be "*established*" by a church, not merely an affiliated group, to be a "church plan." *Kaplan*, 810 F.3d at 180 (emphasis added); *Stapleton*, 817 F.3d at 523; *Rollins*, 830 F.3d at 906.

Church-affiliated groups that establish *and* maintain their own retirement plans, in other words, must once again prove they are themselves "churches" to gain the benefit of the ERISA exemption. That means that the questions of church doctrine, polity, and administration that the IRS answered in 1977 (and that

Congress hoped to obviate in 1980) are again matters for the government to resolve—with potentially vast financial consequences for churches, affiliated organizations, their employees, and the needy persons they all serve.

Petitioners argued below that that interpretation creates concerns under the Religion Clauses that should be avoided. The courts below noted that Congress sometimes expressly distinguishes between churches and affiliated organizations, and so declined to apply constitutional avoidance principles to the implicit distinction here. *Kaplan*, 810 F.3d at 186–87; *Stapleton*, 817 F.3d at 531; *Rollins*, 830 F.3d at 911. If churches do not like the inquiry that this interpretation demands, the courts held, they should structure their retirement plans differently. *Kaplan*, 810 F.3d at 186; *Stapleton*, 817 F.3d at 532; *Rollins*, 830 F.3d at 912.

SUMMARY OF ARGUMENT

As Petitioners have persuasively explained, their interpretation of the "church plan" exemption provisions—like the interpretation followed by the relevant federal agencies—is compelled by those provisions' language, history and purpose. See Pet. Br. 21–46. But a powerful additional reason forecloses the contrary interpretation adopted by the three decisions under review in this case. That interpretation would create enormous constitutional concerns, and would therefore run afoul of the principle that, "[w]here an otherwise acceptable construction of a statute would raise serious constitutional problems, the Court will construe the statute to avoid such problems unless such construction is plainly contrary to the intent of Congress." *Edward J. DeBartolo Corp.* v. *Fla. Gulf Coast Bldg. & Constr. Trades Council*, 485 U.S. 568, 575 (1988); accord *Northwest Austin Mun. Utility Dist. No. One* v. *Holder*, 557 U.S. 193, 197 (2009) ("[The Court's] usual practice is to avoid the unnecessary resolution of constitutional questions."); *United States* v. *X-Citement Video, Inc.*, 513 U.S. 64, 78 (1994) ("It is ... incumbent upon us to read the statute to eliminate [constitutional] doubts[.]").

Here, there is no serious suggestion that the interpretation advanced by Petitioners "is plainly contrary to the intent of Congress." And the contrary reading by the courts below raises two serious risks of unconstitutional government action.

I. One is a risk of unconstitutional interdenominational discrimination. Churches and religious denominations exhibit varying degrees of integration with their affiliated healthcare operations and retirement plans. Because the Seventh-day Adventist Church and its healthcare operations and retirement plans lie at the "highly integrated" end of that spectrum, those plans would qualify for an ERISA exemption even under the approaches adopted by the three decisions under review. Yet that high degree of integration is driven largely by Adventist doctrine and polity—including authoritative teachings of the Church's leading founder, Ellen G. White. The relatively low degree of integration seen in some other religious healthcare systems is likewise largely driven by religious doctrine and polity. Accordingly, these interdenominational differences in the degree of *integration* are driven by interdenominational differences in *doctrine*. And that, in turn, means that a legal standard that relies upon the degree of integration in determining entitlement to a religious exemption—as the decisions below do—will end up discriminating among denominations based upon doctrinal differences.

That result would run afoul of this Court's consistent teaching that, under the First Amendment, government may not adopt policies that "aid one religion' or that 'prefer one religion over another.'" *Valente*, 456 U.S. at 246. Those principles apply not only where specific religious denominations or practices are singled out for burdens or advantages, but

also where government action produces discriminatory effects. *See id.* at 230, 246.

Those principles are especially applicable where, as here, the government acts to accommodate religious practices or institutions. When the government exempts a particular kind of religious activity from regulation, it must do so as to *all* denominations that engage in that activity—even when the religious framework for the activity varies from denomination to denomination. See, *e.g.*, *Bd. of Educ. of Kiryas Joel*, 512 U.S. at 715–16 (O'Connor, J., concurring in part and concurring in the judgment).

The decisions under review do not comply with that principle. Instead, they would create an ERISA exemption for the retirement plans of institutions using one kind of structure, but deny that exemption to similar religious institutions that, "as a matter of policy," have structured their operations differently. *Valente*, 456 U.S. at 246 n.23. Under *Valente* and its progeny, such a result violates the First Amendment.

II. The decisions under review also pose a substantial threat of unconstitutional intrusion into "'the power of religious bodies to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Serbian Eastern Orthodox Diocese*, 426 U.S. at 721–22. The resulting "church autonomy" doctrine prohibits government from intruding unnecessarily into religious institutions' organizational and managerial choices. See *Hosanna-Tabor*, 132 S. Ct. 694 at 706.

The lower courts' position conflicts with those principles because of its premise, namely, that Congress and courts can permissibly distinguish between retirement plans of church institutions based on issues of church organization and hierarchy. But distinguishing retirement plans based on whether they were "established" by a church means deciding whether any particular church-affiliated institution is *itself* a "church," just as the IRS did before ERISA was amended in 1980. Such an analysis inherently raises grave constitutional concerns because it would impede "a religious group's right to shape its own faith and mission," and likely lead to "government involvement in ... ecclesiastical decisions." *Id.* at 706 (Alito, J., concurring).

To the extent Petitioners' interpretation of ERISA's "church plan" exemption raises concerns about large healthcare institutions and retirement plans disingenuously calling themselves "church-related" merely to avoid the costs and burdens of ERISA compliance, that concern can easily be addressed in other, less intrusive ways. One way would be a "safe harbor" for any non-profit healthcare operations that hold themselves out to the public as religious. See, *e.g.*, *Universidad Central de Bayamon* v. *NLRB*, 793 F.2d 383, 402 (1st Cir. 1985) (Breyer, J.) (applying this analysis in context of religious college exemption from National Labor Relations Act); *Univ. of Great Falls* v. *NLRB*, 278 F.3d 1335, 1344 (D.C. Cir. 2002) (same). Just as religious colleges and universities incur signif-

icant financial and reputational costs when they publicly acknowledge their religiosity, so too religious healthcare providers incur substantial costs that, by themselves, deter disingenuous claims of religiosity and church affiliation. That reality eliminates any need to adopt the intrusive—and constitutionally problematic—analysis employed by the courts below.

ARGUMENT

I. The courts of appeals' narrow reading of the "church plan" exemption would create a serious and unnecessary risk of unconstitutional interdenominational discrimination.

Many religious denominations operate health care systems, and many of them—including those of the *amicus* Church—have been the subject of lawsuits similar to the ones now before the Court.[2] Those systems are organized in significantly different ways, differences reflecting not just managerial choices, but differences in religious doctrine and polity. Yet, according to the decisions under review, those differences in organization have great legal significance for the retirement plans offered by religious health care systems. Those decisions thus introduce a risk of un-

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[2] See *Sheedy* v. *Adventist Health System Sunbelt Healthcare Corp., et al.*, No. 6:16-cv-1893 (M.D. Fla., filed Oct. 28, 2016).

constitutional discrimination between religious denominations—one that could be avoided by treating retirement plans more evenhandedly, as Petitioners urge.

A. For reasons of religious doctrine and polity, some religious denominations—such as the Seventh-day Adventists—exhibit a high degree of integration between the church and its health care systems.

The Seventh-day Adventist hospital system lies at one end of the spectrum. It is one of the largest hospital systems in the country, with 84 hospitals employing 126,000 people, plus more than 300 clinics and other facilities.[3] Each year the system handles more than 600,000 inpatient admissions, and over 13 million outpatient visits.[4] Compared with other religious hospital systems, the Adventist hospital system ex-

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[3] Adventist Health Policy Association, "Member Profiles," available at http://adventisthealthpolicy.org/member-profiles.

[4] *Id.*; see also Adventist Health System, "About Us," available at http://www.adventisthealthsystem.com/page.php?section=about; Adventist HealthCare, "About Us," available at http://www.adventisthealthcare.com/about/#.WIDlPBsrJpk; Adventist Health, "About Us," available at https://www.adventisthealth.org/pages/about-us.aspx; Kettering Health Network, "About Us," available at http://www.kettering-health.org/aboutus/.

hibits an especially high degree of integration between hospital administration and the Church. This includes the retirement and health benefit plans offered to employees.

1. The principal reason for this high level of integration is the unique significance that Adventist Church doctrine places on health care. For Seventh-day Adventists, operating hospitals is not just one of many "brand[s] of good works in which the Christian should engage," but is itself a religious act that Adventists are specifically commanded to perform.[5]

As one Seventh-day Adventist doctor put it, "[o]ur medical program came to us by divine revelation."[6] And that revelation came through Ellen G. White—a founder of the Seventh-day Adventist Church, whom Adventists believe had the gift of prophesy. She had a series of visions revealing that Adventists were to establish hospitals: on Christmas Day, 1865, she learned that "[o]ur people should have an institution of their own, under their own control, for the benefit of the diseased and suffering among us who wish to have health and strength that they may glorify God in

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[5] Francis D. Nichol, *The Genius and Scope of Our Medical Work—No. 1*, Ministry (Aug. 1949).

[6] Dunbar W. Smith, *Why a Seventh-day Adventist Medical Work?*, (Part II), Ministry (March 1964).

their bodies and spirits, which are His."[7] She announced that revelation at the General Conference of the Church in May 1866, and the first Seventh-day Adventist health facility, which later became the world-famous Battle Creek Sanitarium, was established later that year.[8]

White's writings repeatedly emphasize that establishing a network of health facilities ("sanitariums," as she often called them) is a central part of the Church's mission. "Sanitariums are to be established all through our world," she wrote, "and managed by a people who are in harmony with God's laws[.]"[9] Indeed, she taught that "[t]he establishment of sanitariums is a *providential arrangement*, whereby people from all churches are to be reached" and taught Adventist doctrine, and thus "made acquainted with the truth for this time."[10]

White's visions thus teach Seventh-day Adventists that church hospitals are a uniquely important

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[7] 1 Testimonies for the Church 492 (1868).

[8] Smith, *supra* n. 6.

[9] Medical Ministry 25 (1932); see also Manuscript 30 (1905). ("In our work of preaching the gospel, we are to establish small sanitariums in many places.").

[10] Counsels on Health 470 (1923).

method of spreading the Church's teachings and preparing the world for Christ's return.[11] The Church's "object in the establishment of these institutions is that the truth for this time may through them be proclaimed."[12]

Working for those hospitals, furthermore, was to be a uniquely important part of the missions of individual Adventists. White thus taught that "[m]edical missionary work is the right hand of the gospel."[13] She even intimated that the health care mission would ultimately be the Church's principal, and perhaps *only*, form of ministerial work.[14]

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[11] 7 Testimonies for the Church 104 (1902) ("These institutions, rightly conducted, will be the means of bringing a knowledge of the reforms essential to prepare a people for the coming of the Lord, before many that otherwise it would be impossible for us to reach.").

[12] Medical Ministry 207; see also 7 Testimonies for the Church 59. ("God's methods of treating disease will open doors for the entrance of present truth."); Medical Ministry 26 (describing the sanitariums as "agencies in the fulfillment of God's great purposes for the human race").

[13] 7 Testimonies for the Church 59; see also *Review & Herald* June 21, 1906, ¶ 22 ("Let us remember that one most important agency is our medical missionary work.").

[14] Counsels on Health 533 ("I wish to tell you that soon there will be no work done in ministerial lines but medical missionary work.").

2. In keeping with the importance of health care to the Church, integrating doctrine and administration into Seventh-day Adventist hospitals is a matter of great importance. The General Conference of Seventh-day Adventists, the governing body of the entire Church, has a medical section, the Department of Health Ministries, which is responsible for assisting the entire church membership in living the Church's health-related teachings.[15] In addition, the Church employs a parallel system for managing its hospitals and other medical institutions. That system relies upon regional Unions, which together make up the General Conference.[16]

Under the leadership of its regional Unions in the United States, the Church has established five systems of Adventist health care covering regions or local groups of affiliated medical centers.[17] Health Ministries staff are responsible for ensuring integration between the Church and Adventist health care facilities

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[15] See General Conference, Adventist Health Ministries, available at http://healthministries.com/.

[16] Health Ministries, North American Division of Seventh-day Adventists, "History, Mission & Organization," available at http://www.nadhealthministries.org/article/16/about-us/history-mission-and-organization.

[17] The systems are Kettering Health Network, Adventist Health, Adventist HealthCare, Loma Linda University Health, and Adventist Health System. See Jane Allen Quevedo, *A Legacy of Health & Healing: Stories of Early Adventist Health Care* vii (2016).

"through memberships on boards, inspections, assistance in recruiting personnel, cooperation with community programs, and support for spiritual ministries including the work of chaplains."[18]

Adventist hospitals thus function as a "branch of the church," "strongly denominational in character and operated by those who know and understand the goals and objectives of the church."[19] And the institutions' scientific and medical functions subserve their spiritual purposes, not the other way around.[20]

By the same token, the Church cannot maintain its involvement with hospitals that are not operated in close consistency with the Church's teachings. Indeed, the Church separated from its one-time crown jewel, the Battle Creek Sanitarium, in part over doctrinal disputes with Dr. John Harvey Kellogg, the hospital's leader.[21]

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[18] See Health Ministries, History, Mission & Organization, *supra* n. 16.

[19] William P. Dysinger, *In His Medical Institutions*, Ministry (Feb. 1977).

[20] See John D. Rogers, *Health Evangelism: Putting the Right Arm to Work—No. 2*, Ministry (Dec. 1950).

[21] See Smith, *supra* n. 6.; Gary Land, *Historical Dictionary of the Seventh-day Adventists* 145 (2d ed. 2014).

The Church thus works to ensure that its hospitals are largely administered by Seventh-day Adventists.[22] In turn, these church members run the hospital consistently with church teachings—including, for example, Saturday Sabbath observance—and integrate the church's teachings into patient care.[23]

3. For similar reasons, this same integration is reflected in the organization of the retirement and health benefit plans available to employees of these Adventist healthcare institutions. In keeping with the unique integration of health care with the Church's other activities, the retirement plan protecting workers at the Church's hospitals was originally created by the Church itself long before ERISA was enacted, and has been controlled by the Church's governing bodies for more than a century.

The General Conference of Seventh-day Adventists established the first retirement fund for Church workers in 1910.[24] This fund, called the "Sustentation Fund," was originally designed to function like a charity.[25] By the 1930s, the Fund had taken on the characteristics of a pension, with defined payment formulas and dedicated funding from Church institutions,

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[22] Dysinger, *supra* n. 19.

[23] Herman C. Ray, *Sabbathkeeping in our medical institutions*, Ministry (Jan. 1962).

[24] General Conference Committee Minutes, Nov. 28, 1910, Book at pp. 304–06.

[25] *Id.*

including the sanitariums. The Fund's operations were described in a series of booklets published at intervals by the General Conference.

Changes to the Sustentation Fund were made by the General Conference itself, in cooperation with a committee of its North American Division known as the Committee on Administration. In 1967, the General Conference voted to divide the Fund into four separate retirement funds, including a Hospital Retirement Fund dedicated to the Church's health care workers.[26] The North American Division voted to adopt the Hospital Retirement Fund the next day—and in doing so noted that "all Seventh-day Adventist hospitals are subordinate units of the General Conference of Seventh-day Adventists[.]"[27]

The Church has continued to operate its hospital retirement plans after ERISA's enactment, and up to the present. That control is reflected, for example, in revised Hospital Retirement Plan documents adopted by the North American Division in 1979 and 1980.[28]

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[26] General Conference Committee Minutes, Oct. 24, 1967, at 67-239.

[27] North American Division Committee on Administration Minutes, Oct. 25, 1967, at 67-152–161.

[28] North American Division Committee on Administration Minutes, Apr. 4, 1979, at 79-41–42; North American Division Committee on Administration Minutes, Sept. 25, 1980, at 80-93–94.

Although the Division chose to fund the Plan consistently with ERISA's requirements,[29] the Church has operated the Plan as a "church plan" under ERISA since the 1980s—and received an IRS ruling to that effect in 1992. Today, the Plan is administered by the Church's Adventist Retirement Board, whose members are all appointed by the North American Division.[30]

In short, it is difficult to imagine a retirement plan more deeply integrated with a major religious body than the Adventist Hospital Retirement Plan.

B. Any attempt to distinguish among the various religious organizations and their related health care systems would raise serious constitutional concerns.

Under the decisions under review, because Seventh-day Adventist health care facilities—and the Hospital Retirement Plan serving their workers—are tied especially closely to the Church, the Hospital Retirement Plan could well have a different status under ERISA than retirement plans of other religious health

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[29] See, *e.g.*, Jan. 1992 Plan Booklet § 7.5.

[30] The Seventh-day Adventist Hosp. Ret. Plan, as amended and restated effective Jan. 1, 2012, at 1. Moreover, under a 1981 trust agreement, the North American Division Corporation of Seventh-day Adventists serves as trustee for the Plan. North American Division Committee on Administration Minutes, Sept. 7, 2010, at 10-233–234.

systems. Under those decisions, that difference would ultimately flow from religious doctrine, *i.e.*, from the centrality of health care to the Seventh-day Adventist Church as opposed to certain other denominations. And that creates a constitutional problem: it would likely violate the First Amendment's prohibition on interdenominational discrimination to deny a "church plan" exemption to denominations whose religious doctrine and polity do not require as high a degree of integration as the Seventh-day Adventist system.

1. As this Court has long held, "[t]he clearest command of the Establishment Clause is that one religious denomination cannot be officially preferred over another"; *i.e.*, that the government may not "'pass laws which aid one religion' or that 'prefer one religion over another.'" *Valente*, 456 U.S. at 246; *Bd. of Educ. of Kiryas Joel*, 512 U.S. at 715 (O'Connor, J., concurring in part and concurring in the judgment) ("Absent the most unusual circumstances, one's religion ought not affect one's legal rights or duties or benefits."). Any law that "grant[s] a denominational preference" is thus "suspect," and subject to strict scrutiny. *Valente*, 456 U.S. at 246; see also *Sklar* v. *C.I.R.*, 282 F.3d 610, 619 (9th Cir. 2002).

That principle applies not only in circumstances where certain religious denominations or practices are singled out for burdens or advantages, but also when laws interact with a denomination's history or beliefs to produce discriminatory effects. In *Valente*, for example, this Court considered a state statute that

imposed certain registration and reporting requirements on charitable organizations but exempted religious organizations that solicit more than 50 percent of their funds from non-members. 456 U.S. at 230. The statute's terms were neutral, yet the Court held that it "clearly grants denominational preferences of the sort consistently and firmly deprecated in our precedents." *Id.* at 246.

In so holding, the Court observed that the "principal *effect* of the fifty per cent rule is to impose the registration and reporting requirements ... on some religious organizations but not on others." *Id.* at 253 (emphasis added). The *causes* of that distinction, moreover, would inevitably be rooted in doctrine and polity:

> [T]he provision effectively distinguishes between "well-established churches" that have "achieved strong but not total financial support from their members," on the one hand, and "churches which are new and lacking in a constituency, or which, *as a matter of policy*, may favor public solicitation over general reliance on financial support from members," on the other hand.

Id. at 246 n.23 (emphasis added). For that reason, the Court held, the rule created a risk of entangling politics and religion, and so offended the Establishment Clause. *Id.* at 252–53 (discussing *Lemon* v. *Kurtzman*, 403 U.S. 602 (1971)).

As *Valente* also shows, denominational nondiscrimination demands uniform treatment of denominations, not only when the government burdens religious practices, but when the government acts to accommodate them. The charitable exemption in *Valente* applied to some denominations but not others; it was therefore suspect. *Id.* That is because, when the government exempts a particular kind of religious activity from regulation, it has to do so as to *all* denominations that engage in it—even when the religious framework for the activity varies from denomination to denomination. *Bd. of Educ. of Kiryas Joel*, 512 U.S. at 715–16 (O'Connor, J., concurring in part and concurring in the judgment) ("A state law prohibiting the consumption of alcohol may exempt sacramental wines, but it may not exempt sacramental wine use by Catholics but not by Jews.").

2. In contrast to these bedrock teachings, the panel decisions in this case imply that Congress attempted to accommodate religious practices by creating an ERISA exemption for certain retirement plans closely affiliated with churches, but that it failed to extend that exemption to similar religious institutions that, "as a matter of policy," structure their operations differently. *Valente*, 456 U.S. at 246 n.23. Whatever distinctions between churches and affiliated organizations might be acceptable in other cases, *Kaplan*, 810 F.3d at 186–87; *Stapleton*, 817 F.3d at 531; *Rollins*, 830 F.3d at 911, the distinction here strongly resembles the kind of discrimination among denomina-

tions—and the threat of entanglement between government and religion—that this Court invalidated in *Valente*.

Here, as Petitioners have persuasively shown (at 21–46), applying the ERISA "church plan" exemption uniformly to church-based healthcare systems across the spectrum of religious polity and corporate structure is entirely consistent with "the intent of Congress"—as expressed in both statutory language and legislative history. See *Edward J. DeBartolo*, 485 U.S. at 575. And for reasons explained above, interpreting that exemption to apply only to religious healthcare systems at one end of that spectrum would "raise [a] serious constitutional problem," *id.*, specifically, the kind of denominational preference condemned in *Valente*. As a matter of constitutional avoidance, this Court should seek to interpret ERISA in a way that does not raise serious constitutional concerns. And that is a powerful reason to adopt the relevant federal agencies' (and Petitioners') reading, and reject that of the courts below.[31]

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[31] That is not to suggest that denying "church plan" treatment in the cases before the Court would necessarily make constitutionally infirm the application of that same exemption to the Hospital Retirement Plan that serves Seventh-day Adventist health systems. On the contrary, if the Court were to affirm the decisions below, it should at a minimum leave the door open for a different result as to organizations like the Adventist Church and its retirement plans and health care providers. Needless to say, we reserve all arguments that Adventist health care providers and the Hospital Retirement Plan are distinguishable.

II. The courts of appeals' narrow reading would create a serious and unnecessary risk of unconstitutional interference in religious organizations' autonomy.

The lower courts' reading of the "church plan" exemption also creates a serious risk of unconstitutional interference with religious institutions' autonomy. This Court has long held that "religious freedom encompasses 'the power of religious bodies to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine.'" *Serbian Eastern Orthodox Diocese*, 426 U.S. at 721–22 (quoting *Kedroff* v. *Saint Nicholas Cathedral of Russian Orthodox Church in North America*, 344 U.S. 94, 116 (1952)). This "church autonomy" doctrine, which has roots in both the Free Exercise Clause and the Establishment Clause, see *Hosanna-Tabor*, 132 S. Ct. at 706, prohibits a government from unnecessarily interfering—directly or indirectly—in religious institutions' organizational and managerial choices. As long as there is an objective affiliation between a retirement plan and the church, and especially where that affiliation is made clear to the public, the church autonomy doctrine counsels strongly against distinguishing the retirement plans of religious organizations based on the degree or legal form of that affiliation.

1. This Court's precedents establish that the religion clauses are not concerned with whether a particular institution is organized as a "church" or in some

other way, but with whether it is engaged in religious activity. See *Church of the Lukumi Babalu Aye, Inc.* v. *City of Hialeah*, 508 U.S. 520, 524 (1993) (Free Exercise Clause protects "conduct motivated by religious beliefs"); see also *Spencer* v. *World Vision, Inc.*, 633 F.3d 723, 728 (9th Cir. 2011) (O'Scannlain, J., concurring). Those precedents accordingly limit government interference with religious institutions having a wide array of organizational forms, and with varying degrees of affiliation with any denomination's clerical leadership.

That is because an organization's legal form and relationship with a church do not bear on whether the organization is engaged in religious activity. Unincorporated religious congregations and their governing bodies enjoy protections under the religion clauses, of course, but so do churches organized and governed through corporate forms, see *Church of the Lukumi Babalu Aye*, 508 U.S. 520; as do church-owned corporations operating affiliated entities such as schools, *Hosanna-Tabor*, 132 S. Ct. 694, *rev'g* 597 F.3d 769, 772 (6th Cir. 2010) (referring to defendant as an "ecclesiastical corporation"); *Corp. of Presiding Bishop of Church of Jesus Christ of Latter-day Saints* v. *Amos*, 483 U.S. 327 (1987) (gymnasium operated by church-affiliated corporation). A corporation (and certainly a non-profit corporation) deserves protection under the religion clauses when it provides religion-related services to members of a religious community. See *Tenafly Eruv Ass'n, Inc.* v. *Borough of Tenafly*, 309 F.3d 144 (3d Cir. 2002).

Those holdings follow from the fact that behind every organization—incorporated or not, religiously affiliated or not, profit-seeking or not—are human beings, whose individual religious liberties must be respected. *Burwell* v. *Hobby Lobby Stores, Inc.*, 134 S. Ct. 2751, 2768 (2014). When individuals are engaged in religious activity, free exercise and anti-establishment principles make no distinction between the legal forms and organizational structures they choose.

Within a church hierarchy, moreover, questions of how the church chooses to organize itself are outside the purview of secular courts. In *Serbian Eastern Orthodox Diocese*, for example, the Illinois Supreme Court had evaluated—and purported to invalidate as *ultra vires*—the church's decision to separate one diocese into three. 426 U.S. at 720–21. This Court reversed, holding that a court may not substitute its own reading of a church's "constitutions" for that of the church's own governing body. *Id.* at 721. The contrary rule would require a court to "engag[e] in a searching and therefore impermissible inquiry into church polity." *Id.* at 722.

2. By the same token, this and other courts steer clear of distinguishing between activities of religiously motivated institutions based on whether they appear to carry religious significance. As this Court has said, "[t]he prospect of church and state litigating in court about what does or does not have religious meaning touches the very core of the constitutional guarantee against religious establishment[.]" *New*

York v. *Cathedral Acad.*, 434 U.S. 125, 133 (1977). For that reason, "[i]t is well established ... that courts should refrain from trolling through a person's or institution's religious beliefs." *Mitchell* v. *Helms*, 530 U.S. 793, 828 (2000) (plurality).

This Court also avoids evaluating whether the functions of particular entities within a church's overall organization are sacred or secular. See *Corp. of Presiding Bishop*, 483 U.S. at 336 (declining to apply such an analysis to a church-owned gymnasium). Such determinations, the Court has held, are not within a secular court's competence, while a church's expectation that a court might *try* to decide them could interfere with the church's autonomy:

> [I]t is a significant burden on a religious organization to require it, on pain of substantial liability, to predict which of its activities a secular court will consider religious. The line is hardly a bright one, and an organization might understandably be concerned that a judge would not understand its religious tenets and sense of mission. Fear of potential liability might affect the way an organization carried out what it understood to be its religious mission.

Id. (footnote omitted). See also *Catholic Bishop of Chicago*, 440 U.S. at 502 (rejecting a standard for NLRB jurisdiction that would "necessarily involve inquiry into the good faith of the position asserted by the

clergy-administrators and its relationship to the school's religious mission").[32]

Similarly, when a church's agent or employee has religious authority or undertakes religious functions, it does not matter that it also has secular functions—or indeed, that it *primarily* performs secular activity. In *Hosanna-Tabor* for example, this Court treated a church's schoolteacher as a "minister" even though "her religious duties consumed only 45 minutes of each workday, and ... the rest of her day was devoted to teaching secular subjects." 132 S. Ct. at 708. Because she was ordained by her church and performed

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[32] Likewise, federal courts of appeals studiously avoid evaluating whether the functions of entities within a church's overall organization are sacred or secular. See, *e.g.*, *Great Falls*, 278 F.3d 1335 (NLRB may not assert jurisdiction over a religious university's employment disputes by determining that the university did "not have a substantial religious character"); *Cohen* v. *City of Des Plaines*, 8 F.3d 484, 490 (7th Cir. 1993) (explaining that "the legitimate purpose of minimizing governmental interference with the decision making processes of a religious organization can extend to seemingly secular activities of the organization"); *Espinosa* v. *Rusk*, 634 F.2d 477, 479, 481 (10th Cir. 1980) (invalidating application of city solicitation ordinance that exempted "solicitations by religious groups solely for 'evangelical, missionary or religious but not secular purposes'" because it "involves municipal officials in the definition of what is religious"); see also *Spencer*, 633 F.3d at 730 (O'Scannlain, J., concurring) ("If we should not be in the business of determining whether a particular 'activity' is religious or secular, our competence to make that determination with respect to a particular 'product' or 'service' is in serious doubt.").

religious functions, the Court declined either to require that she perform "exclusively" religious functions to be treated as a minister, *id.* at 708–09, or to rest its analysis on "the relative amount of time [she] spent performing religious functions[.]" *Id.* at 709.[33]

3. The lower courts' position in the cases at issue here conflicts with those principles. An important premise of those decisions is that Congress and courts can permissibly distinguish between retirement plans

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[33] Even the fact of ordination may not be dispositive. See *id.* at 710 (Thomas, J., concurring) ("[T]he Religion Clauses require civil courts to apply the ministerial exception and to defer to a religious organization's good-faith understanding of who qualifies as its ministers."); *id.* at 715 (Alito, J., joined by Kagan, J., concurring) ("What matters is that respondent played an important role as an instrument of her church's religious message and as a leader of its worship activities.").

Likewise, federal courts of appeal and state supreme courts reject invitations to delve into whether the job functions of a particular agent of a religious entity are sufficiently religious to make the agent a minister. See, *e.g.*, *Cannata* v. *Catholic Diocese of Austin*, 700 F.3d 169, 177 (5th Cir. 2012) (applying ministerial exemption to church music director under *Hosanna-Tabor* despite claim that his responsibilities were not "religious in nature"); *Coulee Catholic Sch.* v. *Labor & Indus. Rev. Comm'n*, 768 N.W.2d 868, 882 (Wis. 2009) (evaluating a ministerial exemption based on a "functional" test, rather than on "whether a majority of the employee's time is spent on quintessentially religious tasks"); *Montrose Christian Sch. Corp.* v. *Walsh*, 770 A.2d 111 (Md. 2001) (holding that limitation of employment law exemption to workers performing "purely religious functions" violated the First Amendment).

of church-affiliated institutions based on church organization and hierarchy. But distinguishing retirement plans based on whether they were "established" by a church means deciding whether any given church-affiliated institution is *itself* a "church," just as the IRS did before ERISA was amended in 1980. GCM 37266, 1977 WL 46200, at *3 ("Thus, the question presented is whether the subject religious orders are 'churches.'").

There is no way to conduct that analysis without raising grave constitutional concerns. Consider the dilemma of a court required to decide whether a particular religiously affiliated health care institution constitutes a church. The court would have little choice but to consider such things as whether the institution is a locus of decision making on doctrinal matters, whether members of its denomination consider it to have independent religious significance, the religious qualifications of its management, the extent of supervision by outside legal authorities, the extent to which it incorporates religious rites and observance into its functions, and so on. Indeed, that is precisely what the IRS did before ERISA was amended. See *id.* at *5–*6.

In such a legal regime, the court also could hardly help applying a different analysis to health care institutions of congregational denominations—composed of independent and autonomous communities—than it applies to hierarchical ones. But that means a court could easily develop a test in the context of a case involving a congregational domination that would turn

out to be utterly unworkable in the context of a hierarchical one, or vice versa. Perhaps the court would feel compelled to conclude that, while some institutions affiliated with congregational denominations are themselves churches, institutions affiliated with (but not controlled by) hierarchical denominations cannot be. Or perhaps it would distinguish the "religious orders" of hierarchical religions, see *id.* at *3, from lay bodies that answer to church leadership.

It is hard to imagine anything more offensive to this Court's conception of the Religion Clauses. It would presage exactly the same "secular control [and] manipulation" of religious institutions that this Court has always cautioned against. *Kedroff*, 344 U.S. at 116. Indeed, it would threaten the guarantees of both Religion Clauses: the Free Exercise Clause, because it would impede "a religious group's right to shape its own faith and mission," and the Establishment Clause, because it would lead to "government involvement in ... ecclesiastical decisions." *Hosanna-Tabor*, 132 S. Ct. at 706.

After all, the Religion Clauses do not distinguish between the different legal forms religious individuals and communities might choose when they organize. See *Hobby Lobby*, 134 S. Ct. at 2768. To the contrary, those clauses categorically prevent courts from intruding upon a church's organizational and management decisions. See, *e.g.*, *Serbian Eastern Orthodox*

Diocese, 426 U.S. at 720–22.[34] And they categorically prevent both "church and state" from "litigating in

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[34] Accord, *e.g.*, *Kedroff*, 344 U.S. at 116 (acknowledging religious organizations' "independence from secular control or manipulation, in short, power to decide for themselves, free from state interference, matters of church government as well as those of faith and doctrine."); *Presbyterian Church in the United States* v. *Mary Elizabeth Blue Hull Mem'l Presbyterian Church*, 393 U.S. 440, 449 (1969) (warning of hazards of "implicating secular interests in matters of purely ecclesiastical concern."); *Kreshik* v. *Saint Nicholas Cathedral*, 363 U.S. 190, 191 (1960) (per curiam) (holding that neither the legislature nor the judiciary could permissibly interfere with internal church governance); *Church of Scientology Flag Serv. Org., Inc.* v. *City of Clearwater*, 2 F.3d 1514, 1537 (11th Cir. 1993) (holding that city ordinance requiring financial, operational, and organizational disclosures of religious organizations directly violated "the principle that civil authorities must abstain from interposing themselves in matters of church organization and governance"); see also Carl H. Esbeck, *The Establishment Clause as a Structural Restraint on Governmental Power*, 84 Iowa L. Rev. 1, 44 (1998) (describing judicial abstention in cases involving "the choice of organizational structure or polity and its administration, including interpretation of a church's organic documents, bylaws, and traditions"); Douglas Laycock, *Towards a General Theory of the Religion Clauses: The Case of Church Labor Relations and the Right to Church Autonomy*, 81 Colum. L. Rev. 1373, 1414 (1981) ("The right of church autonomy is the right to keep decisionmaking authority over church operations within the church, free of outside control; how that authority is allocated internally is irrelevant. Churches may be hierarchical or congregational, episcopal or democratic, clerical or lay, incorporated or informally associated, a single entity or a network of subsidiaries and affiliates—all are entitled to autonomy by the free exercise clause.").

court about what does or does not have religious meaning." *Cathedral Acad.*, 434 U.S. at 133.[35] But legal questions of "church" status—the issue the respondents here insist courts must decide—present those very dilemmas.[36]

Beyond the intrusion of courts into religious self-governance lie secondary consequences for churches. Contrary to the courts below, see *Kaplan*, 810 F.3d at 186; *Stapleton*, 817 F.3d at 532; *Rollins*, 830 F.3d at 912, religious affiliation, the organization of religious bodies, and allocation of religious authority are not supposed to be matters of enormous legal consequence. It is only a short step from high-stakes "trolling" by courts "through ... [an] institution's religious beliefs," *Mitchell*, 530 U.S. at 828, to a religious institution's changing "the way [it] carrie[s] out what it understood to be its religious mission" in order to

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[35] Accord, *e.g.*, *Corp. of Presiding Bishop*, 483 U.S. at 336; *Hull Church*, 393 U.S. at 450 (holding that First Amendment forbids civil courts from "determin[ing] matters at the very core of a religion—the interpretation of particular church doctrines and the importance of those doctrines to the religion."); see also *Colorado Christian Univ.* v. *Weaver*, 534 F.3d 1245, 1261 (10th Cir. 2008); *Commack Self-Serv. Kosher Meats, Inc.* v. *Weiss*, 294 F.3d 415, 425 (2d Cir. 2002) (New York state laws defining "kosher" violated Establishment Clause because they "require[d] the State to take an official position on religious doctrine"); *Great Falls*, 278 F.3d 1335; *Cohen*, 8 F.3d at 490; *Espinosa*, 634 F.2d at 479, 481.

[36] The Church raised these concerns with Congress during the process that led to the 1980 ERISA amendments. 125 Cong. Rec. 10057 (1979).

anticipate or avoid judicial oversight. *Corp. of Presiding Bishop*, 483 U.S. at 336 & n.14. And when that happens, the fears that animated the Religion Clauses come to fruition.

4. Those who favor a narrower reading of ERISA's "church plan" exemption often cite fears that large healthcare institutions and their affiliated retirement plans will disingenuously call themselves "church-related" merely to avoid the costs and burdens of ERISA compliance. See, *e.g.*, Brief for AARP and the National Employment Lawyers Association in Support of Appellees Urging Affirmance, *Kaplan* v. *Saint Peter's Healthcare Sys.*, 810 F.3d 175 (3d Cir. 2015) (No. 15-1172) (decrying widespread "perversion of the church plan exemption"). But concerns about false claims of religiosity are not unique to this context, and indeed have always been viewed as a necessary cost of religious liberty, which has helped prevent and sooth sectarian conflict throughout our history. See, *e.g.*, *Sherbert* v. *Verner*, 374 U.S. 398, 407 (1963).

Moreover, if false claims to an exemption are deemed particularly problematic in this context, courts and agencies could easily deal with that risk in the same way that the First and D.C. Circuits have dealt with a similar risk in the analogous context of religious colleges and universities. For example, in *Universidad Central de Bayamon* v. *NLRB*, the First Circuit rejected the NLRB's assertion of jurisdiction over a "Catholic-oriented" university that had refused

to bargain with a union representing university faculty. 793 F.2d at 402 (Breyer, J.). Citing this Court's analysis in *NLRB* v. *Catholic Bishop of Chicago*, 440 U.S. 490, then-Judge Breyer concluded that the First Amendment concerns applicable to "pervasively sectarian" schools apply with equal force to entities that provide a "basically" secular education but that "maintain[] a subsidiary religious mission." *Bayamon*, 793 F.2d at 398–400. Just as the NLRB's attempts to distinguish between "completely religious" and "religiously-associated" primary schools failed to pass First Amendment muster in *Catholic Bishop*, the agency's ad hoc efforts to disaggregate the religious from the non-religious elements of the university in *Bayamon* implicated the same "kind of 'entanglement'—arising out of the inquiry process itself." *Id.* at 401. In light of these concerns, then-Judge Breyer instead evaluated factors such as whether the entity in question "holds itself out" to the public as a religious institution and is affiliated with or controlled by a church or other religious organization. *Id.* at 399–400, 403. The D.C. Circuit adopted a similar approach in *University of Great Falls* v. *NLRB*, 278 F.3d at 1344, which looked, among other things to whether an institution "holds itself out to students, faculty and community as providing a religious educational environment" and "is affiliated with, or owned, operated, or controlled, directly or indirectly, by a recognized religious organization, or with an entity, membership of which is determined, at least in part, with reference

to religion." *Id.* at 1343 (quotation marks omitted) (citing *Bayamon* and *Catholic Bishop*).

The same principles apply here. Just as religious colleges and universities incur certain costs when they publicly acknowledge their religiosity, so too religious healthcare providers incur costs that, by themselves, deter disingenuous claims of religiosity and church affiliation. As with religious colleges, some potential patients won't be treated by a religious healthcare provider; some potential employees won't work there, and some potential donors won't donate, simply because of the institution's religiosity or its affiliation with a church that isn't favored by the potential patient, employee or donor. See *Great Falls*, 278 F.3d at 1344; *Bayamon*, 793 F.2d at 398–400. As with a college or university, therefore, a healthcare provider already has ample incentives *not* to claim a religious character or affiliation falsely.

Accordingly, as in the religious college context, any concern about false claims of religious affiliation by healthcare providers and their retirement plans can be adequately addressed simply by requiring that the provider hold itself out to the public as religiously affiliated and that it in fact be affiliated with a bona fide religious body of some kind. Because neither of these facts is disputed in the cases here, any concerns that the providers now before the Court might falsely claim a religious affiliation can be dismissed.

CONCLUSION

In sum, all the considerations that support exempting church plans from ERISA support interpreting that exemption broadly. In any event, given the constitutional doubts about an interpretation of ERISA that sets the statute at war with religious liberty principles, this Court should interpret the "church plan" exemption to avoid such a conflict.

For those reasons and others cogently explained by Petitioners, the decisions below should be reversed.

Respectfully submitted,

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